Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1296

UNITED STATES NAVIGATION INC.,

and

SCINDIA STEAM NAVIGATION CO., LTD.,

Petitioners,

—against—

JOHN ESPOSITO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

WILLIAM M. KIMBALL
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Replying *seriatim* to respondent's reasons for denying the writ:

I

Respondent concedes by avoidance the validity of petitioners' declaration that holding a non-negligent demisee liable for injury caused by latent pre-demise unseaworthiness is unprecedented, but argues that amended § 5(b) of the Longshoremen's and Harbor Workers' Com-

pensation Act, 86 Stat. 1263, § 18(a), 33 U.S.C. 905(b), moots the importance of the holding.

Amended § 5(b) abolished unseaworthiness liability only to injured longshoremen and other compensated harbor workers, and does not affect unseaworthiness liability to injured seamen and damaged cargo and vessel owners.

II

Respondent detracts from the erroneous holding that a demisee's undisclosed principal is liable for unseaworthiness on ground of *respondeat superior* by arguing that the Court of Appeals may have affirmed *sub silentio* because respondent was unloading the principal's ship.

If that was the Court of Appeals' rationale, it conflicts with *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202 (1971), reh. den. 404 U.S. 1064 (1972), which distinguished *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206 (1963), reh. den. 374 U.S. 858 (1963), because: "The decision in *Gutierrez* turned, not on the 'function' the stevedore was performing at the time of his injury, but, rather, on the fact that his injury was caused by an appurtenance of the ship * * *.", 404 U.S., pp. 210-211. No decision, including that below, holds that a barge tied to a pier 15-25 feet astern of a ship is an appurtenance of the ship.

III

Respondent argues that the Court of Appeals' affirmance was not summary because it was "on the opinion of Chief Judge Mishler below" (app'x B to petition).

Because Judge Mishler's opinion either vitiates or transforms fundamental law, the Court of Appeals' unexplained affirmance was inappropriate.

Respectfully submitted,

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March 31, 1978